

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4539 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

UNITED PHOSPHORUS LTD.

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 4539 of 2003
MR MB TRIVEDI for NANAVATI ASSOCIATES for
the Petitioners
MR DN PATEL for the Respondents

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE K.M.MEHTA

Date of decision: 06/05/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI)

#. Rule. Mr. D.N.Patel waives service of rule. At the request of both the sides, we take up the matter for final disposal.

#. The petitioners have challenged the communication dated 10th January, 2003, issued by the Assistant Commissioner of Central Excise and Customs, Division I, Ankleshwar, by which the refund claim application which was made by the petitioner was returned with an observation that the relevant date for the purpose of Section 11BB of the Central Excise Act, 1944, would be from the date of fresh filing of the refund claim. The petitioners, by letters dated 20th December, 2002, submitted two refund applications to the respondent no.3, claiming the refund of the excess duty of Rs. 1,36,040/in respect of Unit-I and Rs. 20,21,872.96 ps. in respect of Unit-III, paid by the petitioner for the goods cleared during the period from January, 2002 to March, 2002. Copies of these two refund applications are at Annexures:A/1 and A/2 to the petition. According to the petitioners, during this period, they cleared the goods manufactured by them from their factories through their various depots on payment of central excise duty at higher value than the value at which the duty should have been paid by them. The petitioner paid the duty at a price higher than the price prevailed at their depots at the time of the clearance of their goods from the factory as per their claims.

#. The applications show that they were made under Section 11B of the Central Excise Act, 1944. Under Section 11B of the Act, any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Commissioner or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in the prescribed form accompanied by documentary or other evidence as the applicant may furnish, to establish that the amount of duty of excise in relation to such refund claim was collected from or paid by him and that the incidence of such duty had not been passed on by him to any other person. Under sub-section (2), the Assistant Commissioner or the Deputy Commissioner as the case may be, is empowered to make an order of refund. Any person aggrieved by any order made under Section 11B would be entitled to prefer an appeal under Section 35 of the Act. It is, therefore, incumbent upon the authority to which an application is made for refund to make an order on such application. By the impugned order, the Assistant Commissioner adopted a

novel procedure of returning the claim application which is not contemplated by the provisions of the Act or the Rules made thereunder. By returning the application claiming refund under Section 11B which was already filed in the office of the Assistant Commissioner, the officer acted contrary to the provisions of the Act and the Rules under which he was obliged to make an order on the merits of an application for refund: Once any such application is filed before the concerned authority, it becomes a part of the record of the concerned authority and important original record like an application for refund could not have been parted with by the Assistant Commissioner by returning it to the claimant. Returning of such application has a serious consequence, because, the fresh application may not be within time from the relevant date and the claimant would lose a valuable right of filing an appeal, if any adverse order would have been passed on the application rejecting it on the ground of any infirmity that may have been noticed by the authority instead of the unceremonious return of the application. The course adopted by the Assistant Commissioner, of returning the claim application without making an order thereon amounts to refusal to perform the statutory duty imposed on him to consider the application and make an order thereof, in accordance with law.

#. The impugned order returning the application of the petitioners for refund of claim is, therefore, illegal and void and is liable to be set aside only on the ground that it was the duty of the Assistant Commissioner to have considered the claim application and made an order thereon under the provisions of Section 11B of the Act and the relevant rules. The impugned order dated 10.1.2003 is, therefore, hereby set aside with a direction that on presentation by the petitioners of the original application dated 20.12.2002 which was returned to them under the impugned order, that application shall be taken on record by the Assistant Commissioner and it shall be duly considered and an appropriate decision be taken thereon in accordance with law after giving adequate opportunity to the applicant to furnish proof, if any, in support of his claim. Rule is made absolute accordingly with no order as to costs.

[R.K. ABICHANDANI, J.]

[K.M. MEHTA, J.]

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